Filed 2/19/19 P. v. Lorenzo CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JAIME LORENZO, Defendant and Appellant.	B285142 (Los Angeles County Super. Ct. No. VA102845)

APPEAL from a judgment of the Superior Court of Los Angeles County, John A. Torribio, Judge. Affirmed.

Charles R. Khoury, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, Peggy Z. Huang, Deputy Attorney General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Jaime Lorenzo appeals the trial court's failure to order a supplemental probation report prior to resentencing him upon a grant of a habeas corpus petition. We agree that the trial court erred but conclude that the error was harmless. We therefore affirm.

II. PROCEDURAL HISTORY

This case is before us for the second time. The following facts are from our prior nonpublished opinion in *People v. Carino* (Mar. 24, 2011, B220035). In 2009, defendant was "convicted, following a jury trial, of the second degree murder of Albert Rojas in violation of Penal Code section 187, subdivision (a) (count 1) and the first degree murder of Federico Perez also in violation of section 187, subdivision (a) (count 2). . . . The jury found true as to both [defendant and co-defendant David Carino] the allegation that a principal was armed with a firearm in the commission of the murders within the meaning of section 12022, subdivision (a)(1)." (*Ibid.*) "The jury found not true the allegation that [defendant] personally used a firearm within the meaning of section 12022.53, subdivision (b)." (*Ibid.*)

"The same jury convicted [co-defendant Cesar Cardenas] of vehicular manslaughter with gross negligence in the death of Rojas, in violation of section 192, subdivision (c)(1)." (*Ibid.*)

The evidence at trial demonstrated that on an evening in October 2007, the two murder victims and their friends walked out of a bar. (*People v. Carino, supra,* B220035.) One of the friends, Erik Calderon, "relieved himself between two parked

cars in the parking lot. . . . Someone said, 'Did you call us [expletive]?' Erik saw that a truck was parked in the middle of the parking lot with the doors open. Four people were standing in front of [one of Erik's co-workers]. The men were Juan Garcia, [defendant, and Carino]. Carino and one other man were holding guns. (*Ibid.*)

"The two men with guns pointed them at Erik. Erik repeated that they were leaving.

"[Victim] Rojas walked up to the group, and the men pointed their guns at him. Garcia asked Rojas who he was. Rojas raised his hands to his shoulders and raised his sweatshirt slightly. Rojas started walking backwards away from the men. Garcia swung at Rojas, grazing his chin. Garcia then told the other men to hold Rojas. The three men rushed toward Rojas, who continued to walk backwards and attempt to protect his face. Garcia continued swinging.

"When Rojas reached the sidewalk on Gage [Street], [victim] Perez ran up and began swinging. Garcia and two of the men turned their attention to Perez and tried to hit him. One man stayed with Rojas. Carino held a revolver and looked at Perez. Rojas tried to get away and took a gun dropped by [defendant]. Rojas moved toward Perez. Carino fired at Perez, but the gun did not go off. He fired again and hit Perez. He then fired three shots at Rojas, who was about five feet away. The shooting was described in the reverse order [by a worker from the bar].

"Rojas was in front of a Maxima sedan. He fell after being hit by the gunshot. Before he hit the ground, the Maxima, driven by Cardenas, hit him. The front end of the car lifted. Rojas, who weighed 250 pounds, became stuck between the front wheels of

the car. . . . [Cardenas made repeated attempts to move the car and eventually drove down the street], dragging Rojas under the car. Both [Rojas and Perez] later died [from their injuries]." (*People v. Carino, supra,* B220035.)

"[Defendant] was interviewed by the police and told them that Carino shot Perez and Rojas. He said that Carino gave him a semi-automatic handgun before they got out of the truck. Carino had a revolver. During [defendant's] fight with a man, the gun fell out of [defendant's] pocket. [Defendant] heard gunshots, picked up his fallen gun, got into the truck and gave the gun back to Carino. They drove away." (*People v. Carino, supra,* B220035.)

"The trial court sentenced [defendant] to 25 years to life in state prison for the first degree murder conviction, plus a concurrent 15 year to life term for the second degree murder conviction." (*People v. Carino, supra,* B220035.) This court affirmed the conviction and judgment as to defendant. (*Ibid.*)

On January 28, 2015, defendant filed a petition for a writ of habeas corpus in the trial court, contending that he could not be convicted of first degree murder as an aider and abettor with a natural and probable consequences theory under *People v. Chiu* (2014) 59 Cal.4th 155. The District Attorney filed a concession brief, agreeing that the petition should be granted. The District Attorney elected not to retry defendant on first degree murder and instead agreed defendant's conviction on count 2 should be reduced from first degree to second degree murder, and that defendant should be resentenced accordingly.

On March 17, 2017, the same trial judge who had presided over the trial and sentenced defendant, granted defendant's petition and reduced defendant's first degree murder conviction

to second degree murder. In rejecting defendant's argument that he should be sentenced to involuntary manslaughter,[1] a decision defendant does not challenge in this appeal, the trial court stated, "Well, I have to say, counsel, that I heard the case, and I think this young man was up to—I think the evidence is ample and almost overwhelming that he was up to his ears in this whole transaction. [¶] He wasn't a bystander swept up by the events that—and there he is with his buddy and his gun falls out of his pocket and people die." The court then continued the hearing and permitted both parties to file supplemental briefs on whether the trial court had the authority to sentence defendant anew, in addition to reducing defendant's conviction to second degree murder. During the course of that hearing, defense counsel requested that the court order a probation report. The court did not expressly rule on the request but did not order a report.

Defendant filed two sentencing briefs. In support of those briefs, defendant submitted a note from a doctor, the Chief Physician of the Sheriff's Department Medical Services Bureau, which stated that in the past two years, defendant had been diagnosed with multiple sclerosis. The letter described defendant's symptoms and prognosis. Defendant also submitted medical records from the Department of Corrections and Rehabilitation related to the diagnosis. Defendant again requested that the court order a probation report.

The record contains at least three copies of one of

---

[1] Defendant has filed a separate petition for habeas corpus in which he contends that his appellate counsel was ineffective for failing to argue that the trial court should have instructed the jury on involuntary manslaughter. (*In re Lorenzo* (B291336), petn. pending)

defendant's sentencing briefs. One of those copies includes hand-written annotations in the form of underlining, boxing around words, and a margin note that states "Lorenzo."

On July 19, 2017, the trial court conducted the sentencing hearing. In response to defendant's argument that he should be sentenced to involuntary manslaughter, the court stated, "Okay. [¶] Well, I would indicate that even if I had the power, I would not exercise it. [¶] This young man was convicted of two counts of second degree murder, and I just don't think it's appropriate a probationary sentence be granted, so even assuming for the sake of argument that I have the discretion, I would not vacate the earlier sentence of 15 to life on the affirmed count and consider a motion for probation."

Defense counsel then reminded the court that it had the power to consider "what he's done that you don't know about. It happened in prison. That's a very important—"

The trial court responded, "I—I would indicate to you that I don't—I'm trying to tell you as clearly as I can, I don't care if he's been a model prisoner. That, to me—I'm looking at the total circumstances of this case. I will assume he's been a model prisoner; he's done everything he's supposed to do. I just don't think based on the circumstances of this case that I—I will grant probation. That's all I'm trying to say."

After hearing further argument from counsel, the trial court sentenced defendant to "15 years to life. [¶] All other conditions as stated before apply."

III. DISCUSSION

Defendant contends that the trial court erred in failing to order a probation report prior to resentencing. The Attorney General concedes error but argues such error was harmless.

We agree that the trial court erred in failing to order a supplemental probation report prior to resentencing defendant.[2] (See Cal. Rules of Court, rule 4.411(a)(2) ["the court must refer the case to the probation officer for: [¶] . . . [¶] [a] supplemental report if a significant period of time has passed since the original report was prepared"].)

"Because the alleged error implicates only California statutory law, review is governed by the *Watson* harmless error standard. (See *People v. Watson* (1956) 46 Cal.2d 818, 834-836 . . . .) That is, we shall not reverse unless there is a reasonable probability of a result more favorable to defendant if not for the error. (*Watson, supra*, at p. 836.)" (*People v. Dobbins* (2005) 127 Cal.App.4th 176, 182.)

Defendant contends that the trial court's error was not harmless because: (1) at any future parole hearing, defendant will have to rely on an outdated probation report; and (2) a supplemental probation report would have corrected what defendant describes as the trial court's misunderstanding of

---

[2] Penal Code section 1203, subdivision (b)(1) provides that "if a person is convicted of a felony and is eligible for probation, before judgment is pronounced, the court shall immediately refer the matter for [the preparation of a probation report.]" The Attorney General concedes that none of the exceptions to eligibility for probation applies to defendant. The probation office prepared a probation report on August 25, 2009.

defendant's role in the offense. We disagree.

First, defendant's conjecture about potential harm at a future parole hearing is too speculative to constitute prejudice. The test for prejudice "must necessarily be based upon reasonable probabilities rather than upon mere possibilities . . . ." (*Watson*, *supra*, 46 Cal.2d at p. 837.) In applying the harmless error standard of review, we "determine whether the error did in fact prejudice the defendant" (*id.* at p. 835), not whether the error may, at some future point, prejudice the defendant.

Second, contrary to defendant's assertions, he will not be limited to relying on an outdated probation report. Instead, California Code of Regulations, title 15, section 2281 provides that, "[a]ll relevant, reliable information available to the panel *shall* be considered in determining suitability for parole." (Cal. Code Regs., tit. 15, § 2281, subd. (b).) (Italics added.) While defendant suggests that the parole board would not be advised about defendant's medical diagnosis, defendant submitted Department of Corrections and Rehabilitation documents to demonstrate the diagnosis, and defendant does not articulate why these records would not be available to the parole board.

Similarly, we reject defendant's next argument, that a supplemental probation report would have corrected what defendant describes as the trial court's "misunderstanding" of defendant's role in the offense. Defendant argues that we should interpret the handwritten annotations on one of the clerk's copies of defendant's sentencing briefs as evidence that "the judge confused [defendant] with [co-defendant] Garcia who was the man in the blue Dodger shirt who was indeed the instigator of the fight with Rojas resulting in the two deaths."

We decline the invitation because, among other things, there is no reliable evidence in the record as to who made the annotations or their significance. Moreover, even if we were to assume that the trial court: (1) either wrote or relied on the annotations; and (2) misunderstood that defendant wore a blue T-shirt (which was worn by Garcia), when defendant actually wore a white T-shirt, the trial court's comments at sentencing indicate it understood that defendant was armed and actively engaged in a fight with both Rojas and Perez, which resulted in the two murders. While defendant argues that the trial court mistakenly believed that it was defendant (in a blue shirt) who started the fight with Rojas, even if this were true, the sentencing brief's description of the facts indicates that although the man in the blue shirt started the fight, the man in the white shirt quickly joined: "After Rojas approached, the man in the blue T-[s]hirt attempted to hit Rojas. A man in a black shirt and a man in a white T-shirt followed behind and attempted to hit Rojas as well."

Based on this record, we conclude that the trial court's failure to order a supplemental probation report was harmless. Defendant had been in custody since the trial, and during that time, he was diagnosed with multiple sclerosis. The court was aware of the diagnosis and defendant's prognosis. Moreover, the court assumed that all other information about defendant's time in custody weighed in defendant's favor, that is, that defendant had been a model prisoner. Nonetheless, the trial court stated that it "would not vacate the earlier sentence of 15 to life on the affirmed count and consider a motion for probation." Even if the trial court had ordered and reviewed a supplemental probation report, it is not reasonably probable that it would have sentenced defendant to anything less than 15 years. Thus, defendant

cannot demonstrate that, absent the trial court's error, it is reasonably probable that he would have had a more favorable result.

IV. DISPOSITION

The judgment and sentence are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIM, J.

We concur:

BAKER, Acting P. J.

MOOR, J.